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Maurice Finkelstein

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NOTES ON THE RULE AGAINST PERPETUITIES IN NEW YORK

MAURICE FINKELSTEIN †

THE hazard of preparing a will in New York has been continually decreasing since Gray noted it in 1914.¹ The early multiplication of decisions wore itself out, as principles became settled and juristic arithmetic was checked and rechecked.² It ought to be possible now for law students, who have pursued the prescribed course, to draft a testator's wishes with comparative safety.

The rule, of course, must be developed by statements of increasing complexity.

The suspension of the absolute ownership of personalty, or of the power of alienation of realty, or the postponement of vesting of future interests—any one of these will render a provision in a will or deed void, if the suspension or postponement of vesting is for more than two lives in being at the creation of the estate.

The questions raised by this simple statement always involve careful calculation. But given the care, the sums must ever be right.

It has been found useful to treat the problem as if there were here involved a simple series of answers to four specific questions. And it is from that point of view that the rule is easiest taught and learned. To each will or deed, this formula must be rigidly applied.

† Professor of Law, St. John's University School of Law.

¹ GRAY, *THE RULE AGAINST PERPETUITIES* § 750 (3d ed. 1915).

² This trend has been previously noted by the writer in the pages of this REVIEW. See Finkelstein, *Notes on the New York Rule Against Suspension of the Power of Alienation*, 5 ST. JOHN'S L. REV. 1 (1930). But the fourth edition of Gray's book, edited by Roland Gray, repeats unchanged Gray's original dictum. See GRAY, *THE RULE AGAINST PERPETUITIES* § 750 (4th ed. 1942).

Question No. 1: Is there a suspension of the power of alienation of real property or of the absolute ownership of personality? ³

The answer to this question can be seen at a glance. If there are no gifts to unborn persons and no trusts to receive and apply income, there is no suspension. If such be the case, the statutory rule, as far as Section 42 of the Real Property Law and Section 11 of the Personal Property Law are concerned, does not apply, and all goes well.⁴

The above is so obvious as to require but little comment. Since the statute itself defines the term "suspension" as the absence of persons in being who can convey a fee, the fact that all of the donees are in being negates the possibility of suspension.⁵

³ The statutes involved are Section 11 of the New York Personal Property Law and Section 42 of the New York Real Property Law.

⁴ Of course, there still is the rule against remoteness of vesting (discussed here under Question No. 3 and Question No. 4). This rule is said by Chaplin to derive from the statute. He admits, however, that this is only an inference. See CHAPLIN, *SUSPENSION OF THE POWER OF ALIENATION* § 369 (3d ed. 1928). The opposite view has been taken by the writer. See Finkelstein, *supra* note 2. See also Canfield, *The New York Revised Statutes and the Rule Against Perpetuities*, 1 COL. L. REV. 224 (1901); Fowler, *The Modern Law of Real Property in New York*, 1 COL. L. REV. 165 (1901); Whiteside, *Suspension of the Power of Alienation in New York*, 13 CORNELL L. Q. 31, 167 (1927-28).

⁵ As to personal property, the definition of "suspension" is adapted from the Real Property Law. But in both real and personal property, a practical obstacle may arise where a gift is to a class so large as to work a practical, if not a theoretical, suspension. Thus, a gift to A for life, remainder to those who will be native or naturalized citizens of the United States at A's death, would doubtless create obstacles to the conveyance of a fee, although theoretically all members of the class could join in the deed. But the possibility of such eccentric wills has not been here considered. See GRAY, *RULE AGAINST PERPETUITIES* §§ 189, 190 (3d ed. 1915). Moreover, the statute merely requires that there be "persons in being who can convey a fee"; not that they should be practically in a position to do so. At common law, the multiplication of "lives in being" did not affect the application of the rule. *Thelluson v. Woodford*, 11 Ves. 112, 32 Eng. Rep. 1030 (1805).

The rule applies also to powers of appointment. The date of the creation of such powers controls the validity of what is done under them rather than the date of the exercise of the power. *N. Y. REAL PROP. LAW* § 178. The section is also applied to personal property. *Matter of Moehring*, 154 N. Y. 423, 48 N. E. 818 (1897); *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57 (1896). Of course, the exercise of the power itself may be prohibited, if its exercise may be postponed beyond the statutory period. *Matter of Fischer*, 181 Misc. 1044, 42 N. Y. S. 2d 649 (Surr. Ct. 1943). Sometimes, ingenious judicial construction will save an invalid exercise of a power. *Duff v. Rodenkirchen*, 110 Misc. 575, 182 N. Y. Supp. 35 (Sup. Ct. 1920). It seems somewhat difficult to check the judicial arithmetic indulged in by Judge Lehman in this case.

The addition to the above is the judicial determination, not required by the words of the statute, that the creation of a trust to receive and apply income is a suspension both of ownership and of the power of alienation.⁶ Hence, the rule that the presence of a trust as well as of a gift to unborn persons creates a suspension.

Question No. 2: Will the suspension endure for more than two specified lives in being at the creation of the estate or at the death of the testator?⁷

In answer to this question, some propositions emerge clearly: (1) A gift to the unborn child of a person in being is always valid. (2) A gift to the unborn child of unborn parents is always invalid.⁸ In the first case, the "suspension" will come to an end within a life in being. In the second case, it may not.

Likewise, in the matter of trusts, the "suspension" is valid if the trust will end within two specified lives in being; otherwise, it is invalid. The measurement of the duration of trusts, however, is somewhat complicated by three doctrines:⁹ (a) The doctrine of separable trusts; (b) the doctrine of judicial surgery; and (c) the doctrine of administrative trusts.

(a) The doctrine of separable trusts has an evolving history. If A creates a trust to pay the income to B, C and D for their respective lives, and upon the death of each, one-

⁶ Not all trusts suspend the power of alienation. Only such trusts as may be said to require the holding of property in trust, against the will of the parties, create suspension. Thus, trusts which are revokable either by their terms [Robert v. Corning, 89 N. Y. 225 (1882)], or by statute [N. Y. PERS. PROP. LAW § 23; N. Y. REAL PROP. LAW § 118], do not work a suspension.

⁷ This changes the common law rule which merely required contingent interests to vest within lives in being and 21 years. No such minority period is contained in the New York statutes, except that a contingent remainder in fee may be created if a prior vested remainder in fee is given to one who dies under the age of 21. It is the absence of the 21-year term from the New York statutes that makes all suspensions for a fixed term, no matter how short, void. *Matter of Hitchcock*, 222 N. Y. 57, 118 N. E. 220 (1917); *Kalish v. Kalish*, 166 N. Y. 368, 59 N. E. 917 (1901).

⁸ This is, of course, not unlike the rule in *Whitby v. Mitchell*, 44 Ch. D. 85 (1887), at common law, said by some to be independent of the rule against perpetuities. See GRAY, *THE RULE AGAINST PERPETUITIES*, Appendix K, 643 *et seq.* (3d ed. 1915).

⁹ The use of the word "doctrine" is arbitrary. These are more literally canons of construction.

third of the corpus to *X*, the trust is valid, since the court sees here not one trust for three lives but three trusts, each for one life.

Sometimes, of course, the separation is not so clear; as where *A* creates a trust to pay the income to *B*, *C* and *D* for life "and upon their death corpus to *X*." If the testator meant that the trust was to continue until *B*, *C* and *D* are dead, and that until then no part of the corpus was to go to *X*, the suspension would obviously be for three lives. But if (and the courts would incline to that construction) the testator meant that upon the death of each beneficiary, one-third of the corpus would go to *X*, then the trust is obviously separable, and divisible into three trusts, as in the first instance.¹⁰

The desire to uphold rather than to invalidate a deed or will—ever present in the judicial breast¹¹—leads to unrestrained efforts to find a severing intent in the mind of the testator or settlor. But this has not always been possible, as *Matter of Horner*¹² and *Matter of Trevor*¹³ have long ago shown.

(b) The doctrine of judicial surgery has helped to validate many otherwise faulty testaments. Joined to the doctrine of separable trusts, it forms a formidable weapon in the hands of the courts to effectuate testators' intentions. Primarily, one is concerned with deciding whether or not the testator would have retained the valid portion of his will had he known that the invalid portion would be excised.¹⁴

It is necessary, when applying judicial surgery, to find a valid primary gift, fully separate and apart from the invalid portion to be excised.¹⁵ This is clear when the invalid

¹⁰ An optimistic testatrix left her property in trust till the death of the survivor of her five daughters. It took only a judicial sentence to render her intestate. *In re Grace's Estate*, 73 N. Y. S. 2d 200 (Surr. Ct. 1947).

¹¹ See, for example, validation of trust for fixed period of years, by reading into the will the intention, not found therein, to terminate the trust on the death of two life beneficiaries. *In re Ayres' Will*, 76 N. Y. S. 2d 897 (Surr. Ct. 1947).

¹² 237 N. Y. 489, 143 N. E. 655 (1924).

¹³ 239 N. Y. 6, 145 N. E. 66 (1924).

¹⁴ For interesting examples, see *In re Smith's Will*, 67 N. Y. S. 2d 330 (Surr. Ct. 1947); *In re Fuller's Will*, 72 N. Y. S. 2d 498 (Surr. Ct. 1947).

¹⁵ *Matter of Naylor*, 195 Misc. 775, 88 N. Y. S. 2d 336 (Surr. Ct. 1949).

portion is found in a codicil,¹⁶ or where a testator indulges in the familiar practice of creating invalid cross remainders in trust after carefully setting up valid trusts.¹⁷

Occasionally, one finds it difficult to reconcile the result reached by the court with any supposed intent of the testator.¹⁸ But the test is admittedly not one of law but of judgment.¹⁹ Of necessity, we extrapolate into a realm of darkness when we conclude that the testator would have retained one part of a will had he known another would be held invalid.

(c) The doctrine of administrative trusts is in reality a method of upholding an otherwise invalid provision for a period measured by the minority of a legatee. In these cases, the trustees may be directed not to pay over the corpus after the two lives until the recipient attains the age of 21. There is nothing in the statute to justify upholding such a provision. But by treating the interest of the infant as vested fully and completely, and the direction to withhold payment as purely administrative, the courts have found a way to validate the otherwise seemingly invalid provision.²⁰

Aside from the three doctrines already mentioned, there are a few simple guides, which help to measure the duration of trusts.

Thus, even a trust to endure for two lives will not be upheld if one or both of them is or may not be in being at the creation of the estate. A testator who dies leaving a trust to pay the income to his unmarried daughter and her husband for life, has failed of his purpose, for no matter how old the daughter may be at his death, she may theoretically yet wed a man not in being.²¹ This can be avoided by the insertion of a proviso that the husband be a person in being. Probably the holding in these cases is often as un-

¹⁶ *Matter of Eveland*, 284 N. Y. 64, 29 N. E. 2d 471 (1940).

¹⁷ *Matter of Lyons*, 271 N. Y. 204, 2 N. E. 2d 628 (1936); see also cases cited in notes 12 and 13 *supra*.

¹⁸ *In re Geiger's Estate*, 73 N. Y. S. 2d 196 (Surr. Ct. 1944).

¹⁹ See CHAPLIN, *op. cit. supra* note 4, §§ 528-545.

²⁰ See *Matter of Eveland*, 284 N. Y. 64, 29 N. E. 2d 471 (1940). See also Note, 26 CORNELL L. Q. 492 (1941).

²¹ *Schettler v. Smith*, 41 N. Y. 328 (1869).

realistic as the refusal of the common law courts to recognize that the possibility of issue has become extinct.²²

Recently, the courts have upheld what in effect is a suspension for more than two lives, where the lives in excess of two are carved out, in a separate instrument, from a reversion retained by the settlor or donor.²³ The operation, however, requires careful draftsmanship. It is necessary that it be clear that the settlor or testator reserves a reversion or remainder within the definition of Section 39 of the Real Property Law, as otherwise there will be no basis for upholding the second disposition.²⁴

It does not matter how many people share in the income of a trust, provided it will terminate within the prescribed period. A trust, therefore, to pay the income to A, B and C, which will terminate when the first two die, is, nevertheless, valid, although it is not known which two lives will measure the duration of the trust.²⁵ This may be confusing at times and has in fact stumped at least one expert.²⁶

One could carry on with a minute discussion of the many forms this problem — the duration of trusts — takes. But enough has been said to point the avenue of approach and to outline the course of analysis.

Question No. 3: Are there any contingent future interests? Except where there are provisions for unborn per-

²² *Jee v. Audley*, 1 Cox 324, 29 Eng. Rep. 1186 (1787); *In re Sayer's Trusts*, L. R. 6 Eq. 319 (1868). But see *Cooper v. Laroche*, 17 Ch. D. 368 (1881), which recognized that women past sixty years of age cannot bear children. Speaking of the decision of Malins, V.C., in the last cited case, Gray says: ". . . [T]here can be little doubt that *Cooper v. Laroche* must be considered one of the not unfrequent blunders of that learned judge." GRAY, *THE RULE AGAINST PERPETUITIES* §215.1 (4th ed. 1942). This rule is singled out for special condemnation in Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 732 (1952). This rule, however, avoids the judicial burden of deciding the purely medical question of childbearing age. Moreover, there is no limit on the age of foster parents in the case of adoption. Of course, rights of adopted children are the same as those of natural children. *Gilliam v. Guaranty Trust Co.*, 186 N. Y. 127, 78 N. E. 697 (1906).

²³ *New York Trust Co. v. Weaver*, 298 N. Y. 1, 80 N. E. 2d 56 (1948).

²⁴ *Guaranty Trust Co. v. N. Y. Trust Co.*, 297 N. Y. 45, 74 N. E. 2d 232 (1947).

²⁵ *Meldon v. Devlin*, 31 App. Div. 146, 53 N. Y. Supp. 172 (1st Dep't 1898), *aff'd mem.*, 167 N. Y. 573, 60 N. E. 1116 (1901); *In re Jarvie's Will*, 73 N. Y. S. 2d 246 (Sup. Ct. 1947).

²⁶ Niles, *Future Interests*, 23 N. Y. U. L. Q. REV. 785, 791 (1948).

sons, this may prove troublesome. Of course, gifts to unborn persons are always contingent. On the other hand, gifts to persons in being may also be contingent. Construction of the instrument is all important.

The statute has not cleared up the difference between vested and contingent future interests.²⁷ Yet some propositions are settled.

A contingent interest arises out of one of three possibilities: (1) Either the person who is to take is uncertain; or (2) if he is an ascertained person, the event upon which he is to take is uncertain; or (3) both. In the first case, the uncertainty may derive from the fact that the donee is an unborn person, or if a person in being, not yet ascertained—as the oldest of my brothers living at the death of my son.

Where the contingency is due to the fact that the donee is unborn, there is also a suspension.²⁸ Otherwise, since the persons in being may unite to convey a fee, there is no suspension.

Some lawyers think that Judge Woodruff, in *Moore v. Littel*,²⁹ stated a test for distinguishing between vested and contingent future interests. But Chaplin³⁰ long ago exposed this error, and the "point your finger" test, though emphatically adopted by Judge Woodruff, has seldom been followed.³¹

Gray thought that the common law tests to determine whether a future interest is vested or contingent have been changed in New York by statute.³² But he, himself, has pointed to cases inconsistent with this view,³³ and allowed the possibility of the Chaplin view that the common law test still prevails.³⁴

²⁷ N. Y. REAL PROP. LAW § 40.

²⁸ See *supra* p. 247.

²⁹ 41 N. Y. 66 (1869).

³⁰ CHAPLIN, *op. cit. supra* note 4, §§ 571 *et seq.*

³¹ *Hennessy v. Patterson*, 85 N. Y. 91 (1881); *Hall v. La France Fire Engine Co.*, 158 N. Y. 570, 53 N. E. 513 (1899); *Walker v. Marcellus & O. L. Ry.*, 226 N. Y. 347, 123 N. E. 736 (1919).

³² GRAY, *THE RULE AGAINST PERPETUITIES* § 107 (4th ed. 1942).

³³ *Id.* at 93, n. 2.

³⁴ *Id.* at 93, n. 4.

We, therefore, conclude that the answer to Question No. 3 is as follows:

(1) All gifts to unborn persons are contingent. But since such gifts also suspend the power of alienation, the fact of their contingency is immaterial.

(2) If the person to whom and the event upon which are both uncertain, the gift is contingent. Thus, a gift to A for life, remainder to A's children, but if he die without issue, to the youngest of the testator's brothers then living, the gift to the brother is clearly contingent.

(3) Where the person, though in being, is uncertain, the gift is contingent; as where the gift is to A for life, remainder in fee to the youngest of my brothers living at A's death.

(4) Where only the event is uncertain, the test is one of language. Thus, a gift to A for life, remainder to B, but if A die leaving issue, to such issue, creates a vested remainder in B, subject to being divested. But a gift to A for life, remainder to such of his issue as survive him, and in default of such issue to B, creates a contingent remainder in B.³⁵

Now, if it is determined that the provisions under review are vested or vested subject to being divested, they are valid, and one need go no further. But if there are any contingent future interests, we come to

Question No. 4: When, if at all, will the contingent future interests vest? If the vesting must take place, if at all, within the statutory period, the future interest is valid; otherwise void. Here, it is necessary to remember that we look at the state of affairs at the creation of the estate. Thus, a gift to Frances for life, followed by invalid trusts to her children, but if she die childless to Charles and Maria, creates a contingent future interest in Charles and Maria which, viewed at the date of the testator's death, may not vest within two lives. Hence, the gift over to Charles and Maria is bad, even though in fact Frances never had any children.³⁶

³⁵ *Id.* § 108.

³⁶ *Matter of Wilcox*, 194 N. Y. 288, 87 N. E. 497 (1909).

The most troublesome questions which arise in this connection concern gifts to a class.³⁷ For in such cases, it frequently happens that the members of the class are not ascertained at the creation of the estate. The problems are largely of construction—the eternal hunt for the elusive intent of the testator. The problem is to ascertain if the gift is to remain contingent until the class is closed, or if it is to vest prior thereto either finally or subject to whole or partial divestment.³⁸

If the class is closed within the statutory period, the gift to the class is valid. If the class remains open beyond the statutory period, the gift is void.³⁹ If the class is finally closed within the statutory period, it does not matter that before it is closed members thereof may come into or fall

³⁷ See definition quoted from Jarman in *Matter of Kimberly*, 150 N. Y. 90, 93, 44 N. E. 945, 946 (1896).

³⁸ Rules as to dates of closing of classes may be summarized as follows:

- (a) Gift to children of *A*—only those children of *A* in being can take.
- (b) But if at time gift takes effect *A* has no children, then all afterborn children take as per intention of testator.
- (c) Gift to *A* for life, remainder to *B*'s children—all children of *B* in being at *A*'s death take.
- (d) But in last cited instance, if *B* has no children at death of *A*, all children of *B* take as per intention of testator.
- (e) To *A* for life, remainder to children of *B* who attain 21, class closes at death of *A* if at that time there are children of *B* in being who have attained 21; if not, class closes when first child of *B* to attain 21, does so.
- (f) All above rules subject to caveat that expressed intention of testator is not to the contrary.

See *In re Chartres* [1927] 1 Ch. 466, 471. But if gift is to *A* for life and in default of appointment by *A* "to heirs of testator," class includes only those who would be members at death of testator. *Farmers' Loan & Trust Co. v. Callan*, 246 N. Y. 481, 159 N. E. 405 (1927).

³⁹ *Farmers Loan & Trust Co. v. Callan*, 246 N. Y. 481, 159 N. E. 405 (1927); *Matter of Smith*, 131 N. Y. 239, 30 N. E. 130 (1892); *Gilliam v. Guaranty Trust Co.*, 186 N. Y. 127, 78 N. E. 697 (1906). In such cases, a member of the class does not take a vested interest, but his interest may be defeated by his death before class is closed. *New York Life Ins. Co. v. Winthrop*, 237 N. Y. 93, 142 N. E. 431 (1923). Unless the will fixes the date for determination of class membership. *Matter of King*, 200 N. Y. 189, 93 N. E. 484 (1910). Membership in a class fixed on date of vesting. *Matter of Allen*, 151 N. Y. 243, 45 N. E. 554 (1896); *Matter of Hoffman*, 201 N. Y. 247, 94 N. E. 990 (1911). Vesting may be disturbed on one alternative, as when member of class dies before distribution, but not on another, as when member dies without issue, *Bowditch v. Ayrault*, 138 N. Y. 222, 34 N. E. 514 (1893).

out of it, or even do so conditionally.⁴⁰ The stress is on the time within which the class remains open for admission of new members or the exclusion of old.

Many situations, of course, will arise which may require nicer analysis, but the basis of the calculation has been stated. It may be necessary to work a problem to the nth power, and the absence of juristic comptometers or slide rules often makes the going tough. But through precision and care, accuracy will emerge.

⁴⁰ *Ibid.* Sometimes the courts will excise an invalid provision for divestment. See *Henderson v. Henderson*, 113 N. Y. 1, 20 N. E. 814 (1889).